

TAM:DBS:mel:2000V00753

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA

M. ASH-SHARIEF AL'ASKARI,	:	
Plaintiff	:	Civil No. 1:CV-00-1449
	:	(Caldwell, J.)
v.	:	(Smyser, M.J.)
	:	
KATHLEEN HAWKES, et al.,	:	
Defendants	:	Electronically Filed

**DEFENDANT'S BRIEF IN SUPPORT OF  
HIS MOTION FOR EVIDENTIARY HEARING**

Al'Askari is a former inmate once incarcerated at FCI Allenwood. In 2000, he filed this Bivens action against four BOP employees alleging violations of his due process rights and a denial of access to the courts. A motion to dismiss and for summary judgment was granted by the Court on April 21, 2001, for failure to exhaust administrative remedies. An appeal to the Third Circuit Court of Appeals followed.

In an unreported opinion issued on January 13, 2003, the Third Circuit affirmed the District Court's order to the extent it dismissed the complaint against defendants Hawk-Sawyer, Zimany, and Hursh. However, as to defendant Goldring, the Third Circuit agreed with Al'Askari "that a hearing is required to

resolve a factual dispute concerning the exhaustion of administrative remedies with respect to his access to the courts claim." See Al'Askari v. Hawkes, No. 01-2167, slip op., at 7 (3d Cir., Jan. 13, 2003). Thus, the District Court's order was vacated to the extent it dismissed the complaint against defendant Goldring on the access to the courts claim.

On April 11, 2003, the case was remanded to the Magistrate Judge for further proceedings on this issue. A case management order was issued on April 29, 2003, setting forth the deadlines for discovery, discovery-related motions, dispositive motions, and consent. The deadline for filing dispositive motions and briefs was January 15, 2004.

In light of the Third Circuit's opinion that "a hearing is required," defendant does not believe that the filing of a dispositive motion on the issue of exhaustion would be appropriate. Thus, defendant requests the Court to conduct an evidentiary hearing to resolve the factual dispute in order to

determine whether Al'Askari is entitled to have his access to the courts claim heard on the merits.<sup>1</sup>

Respectfully submitted,

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Dated: January 20, 2004

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<sup>1</sup> Defendant wishes to reserve his right to file dispositive motions on the merits of the access to the court claim should it be determined that Al'Askari was denied access to the administrative remedy process.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion to be competent to serve papers.

That on January 20, 2004, she served a copy of the attached

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by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Williamsport, Pennsylvania.

Addressee:

M. Ash-Sharief Al'Askari  
5737 N. 12<sup>th</sup> Street  
Philadelphia, PA 19141

s/ Michele E. Lincalis  
MICHELE E. LINCALIS  
Paralegal Specialist